IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 19-01-2007

Coram

The Honourable Mr.Justice A.C.ARUMUGAPERUMAL ADITYAN

Second Appeal No.191 OF 1997
and
C.M.P.No.2215 of 1997

S.Jayavel ..Appellant/Defendant

vs.

S.Manickam ..Respondent/Plaintiff

This Second appeal under Section 100 of C.P.C was filed against the decree and judgment dated 22.2.1996 passed in A.S.No.12 of 1993 on the file of the Subordinate Judge, Dharmapuri District, reversing the order of the District Munsif, Dharmapuri, in O.S.No.52 of 1985 on 26.08.1991.

For Appellant : Mr.A.Arul Mozhi
For Respondent : Mr.D.Sivakumar

JUDGMENT

This second appeal has been preferred against the decree and judgment in A.S.No.12/1993 on the file of the Court of Subordinate Judge, Dharmapuri. The defendant in O.S.No.52/1985 on the file of the Court of District Munsif, Dharmapuri, is the appellant herein. The plaintiff/respondent herein filed O.S.No.52/1985 before the District Munsif for specific performance of contract entered into between the plaintiff and the defendant on 1.2.1978. The suit was dismissed by the learned District Munsif. On appeal before the first appellate Court in A.S.No.12/1993 preferred by the plaintiff, the learned Subordinate Judge has set aside the decree and judgment of the trial Court and allowed the first appeal thereby decreeing the suit as prayed for. Aggrieved by the findings of the learned Subordinate Judge in A.S.No.12/1993, this second appeal has been preferred.

2. The short facts relevant for the purpose of deciding this appeal as narrated in the plaint are as follows:-

The defendant had agreed to sell the plaint schedule property for Rs.7,500/- to the plaintiff after receiving Rs.1,000/- towards advance. The sale agreement is dated 1.2.1978. As per the sale agreement

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the possession was delivered to the plaintiff. Inspite of repeated request the defendant has not executed the sale deed. Hence, the plaintiff issued suit notice for specific performance of the contract. The suit property was attached as per the decree in O.S.No.1162/1979 filed by one Ramakrishna Chetty in E.P.358/1980. The defendant has promised to discharge the debt and then executed a sale deed. To cancel the attachment proceedings the plaintiff filed E.A.No.650/1980 in the above said E.P.No.358/1980. The said application was dismissed on 10.01.1984. CMA.No.7/1984 was preferred against the order passed in E.A.No.650/1980, which was also dismissed on 10.1.1984. In E.P.No.358/1980, the plaintiff in order to protect his property has paid Rs.4,540/- before the Court and on that basis it was recorded as the entire debt has been discharged and on the endorsement made by Ramakrishna Chetty, CMP.No.7/1984 was allowed. The plaintiff is liable to pay Rs.1,960 towards balance of sale consideration. Since there was an attachment in respect of the suit property in force from 14.7.1980 to 12.09.1984 the suit is not barred by limitation. Hence, the suit.

3. The defendant in his written statement has contended that his agreement of sale dated 1.2.1978 is true. The plaintiff is the brother of the defendant. Only at the request of the plaintiff, the plaintiff was allowed to reside in the suit house and he undertook to vacate the suit property soon after the marriage of his daughter. But as promised, the plaintiff has not vacated the property. As per the mutation took place between the plaintiff and defendant, the defendant had agreed to sell the house to the plaintiff. But he has not received any amount in advance. But the advance amount was deposited before the mediators. The defendant has agreed to sell the property if the plaintiff pays the entire sale consideration. Since the plaintiff has failed to pay the entire sale consideration he is not entitled to any relief in the suit. The time stipulated under the agreement of sale also expired. The suit is barred by limitation. Hence, the suit is liable to be dismissed.

4. On the above pleadings the trial court has framed six issues. The plaintiff has examined himself as P.W.1 and Ex.P.1 to P.38 were marked on the side of the plaintiff. The defendant has examined himself as D.W.1 and Ex.D.1 to D.11 were marked on the side of the defendant.

5. After going through the oral and documentary evidence, the learned District Munsif has come to the conclusion that the plaintiff is not entitled to any relief under the suit and consequently dismissed the suit with costs. Aggrieved by the findings of the learned Trial Court, the plaintiff has preferred an appeal before the Court of Subordinate Judge, Dharmapuri, in A.S.No.12/1993, who has allowed the appeal setting aside the decree and judgment of the trial Court. Hence, the present second appeal before this Court by the defendant.

6. The substantial question of law involved in this second appeal is whether Section 15 of the Limitation Act is applicable to the suit filed

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under Section 47 of the Specific Performance Act when there is no injunction or stay against the agreement holder to initiate a suit for property involved in a previous suit?

7. The Point:- I have heard the submissions of Ms.V.Arul Mozhi learned counsel for the appellant as well as Mr.D.Sivakumar learned counsel for the respondent and considered their respective submissions.

8. Admittedly the appellant and the respondent are brothers. The plaintiff has filed the suit O.S.No.52/1985 on the file of the District Munsif, Dharmapuri, for specific performance of contract in respect of the plaint schedule property on the basis of the Ex.A.1-agreement of sale dated 1.2.1978. The recitals in Ex.A.1-agreement of sale four months time has been stipulated to perform the contract. Ex.A.1 is dated 1.2.1978. As per the terms of the contract under Ex.A.1, the defendant has to execute a sale deed in respect of the suit property, a house in favour of the plaintiff within four months from the date of Ex.A.1. Admittedly the suit was filed in the year 1985. The suit ought to have been filed three years from 1.6.1978, as per the article 54 of the Limitation Act 1963. The plaintiff in the plaint would allege that there was an attachment in respect of the plaint schedule property in E.P.358/1980 in O.S.No.1162/1979 in favour of one Ramakrishna Chetty, the decree holder against the defendant. According to the plaintiff, the attachment in respect of the suit property was in force from 14.7.1980 to 12.09.1984 and that as per Section 15 of the Limitation Act 1963, the period of attachment i.e., from 14.7.1980 to 12.9.1984 is excluded then the suit is not barred by time. The above argument of the plaintiff was not accepted by the trial Court, consequently the suit was dismissed. But on appeal the first appellate Court has reversed the findings of the learned District Munsif holding that the period of attachment in respect of the suit property from 14.7.1980 to 12.09.1984 is liable to be excluded for the purpose of computing the period of limitation, and ultimately decreed the suit as prayed for.

9. Hence, the only substantial question of law involved in this second appeal is whether the period of attachment from 14.7.1980 till 12.9.1084 in respect of the plaint schedule property as per the order in E.P.358/80 in O.S.No.1162/1979 on the file of the Court of District Munsif, Dharmapuri, is liable to be excluded for the purpose of limitation. Section 15 of the Limitation Act 1963 runs as follows:-

> (1) In computing the period of limitation for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.

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(2) In computing the period of limitation for any suit of which notice has been given, or for which the previous consent or sanction of the Government or any other authority is required, in accordance with the requirements of any law for the time being in force, the period of such notice or, as the case may be, the time required for obtaining such consent or sanction shall be excluded.

Explanation:- In excluding the time required for obtaining the consent or sanction of the Government or any other authority, the date on which the application was made for obtaining the consent or sanction and the date of receipt of the order of the Government or other authority shall both be counted.

(3) In computing the period of limitation for any suit or application for execution of a decree by any receiver or interim receiver appointed in proceedings for the adjudication of a person as an insolvent or by any liquidator or provisional liquidator appointed in proceedings for the winding up of a company, the period beginning with the date of institution of such proceeding and ending with the expiry of three months from the date of appointment of such receiver or liquidator, as the case may be, shall be excluded.

(4) In computing the period of limitation for a suit for possession by a purchaser at a sale in execution of a decree, the time during which a proceeding to set aside the sale has been prosecuted shall be excluded.

(5) In computing the period of limitation for any suit the time during which the defendant has been absent from India and from the territories outside India under the administration of the Central Government, shall be excluded."

So as per Section 15(1) of the Limitation Act, if there is a stay by way of an order of injunction for execution proceedings or an order, the time of the continuance of the injunction or order, the period between the day of which it was issued or made, and the day of which it was withdrawn shall be excluded.

10. The learned counsel appearing for the respondent relying on 2006 (5) SCC 340 (Panchanan Dhara and others Vs. Monmatha Nath Maity(dead) through LRs and another), contended that the above said period of attachment from 14.07.1980 till 12.09.1994 is liable to be excluded for computing the period of limitation. The facts of the above case is that:

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" the second respondent-company was registered and incorporated under the Companies Act, 1956. The said Company possessed the suit property situated in the district of Midnapure in the State of West Bengal. It intended to sell the said property. Respondents 1 and 2 having come to know of the said intention on the part of the Company entered into an agreement for sale thereof, wherefor a sum of Rs.6,000/- was paid to the Company by way of advance. The balance amount was to be paid within a period of fourteen months. As the title of Respondent 2 in respect of the said property was not clear, the Company instituted a suit against some persons who were claiming title thereover on or about 22.5.1971. The said suit was marked as Title Suit No.110 of 1971. In the said suit a compromise petition was filed on 3.4.1979 which having been accepted by the Court concerned, a consent decree was passed on the basis thereof on 3.5.1979. Respondent 1 thereafter issued several letters dated 12.11.1979, 11.1.1980, 5.1.1981 and 8.10.1984 asking the Company to execute and register a sale deed in his favour. The Company in response thereto had all along been assuring Respondent 1 that it would do so. By a letter dated 16.3.1985, one of the Directors of respondent 2 Company assured Respondent1 that no apprehension should be entertained by Respondent 1 that the contract between him and the Company would not be honoured. However, on 21.8.1985, the Company refused to execute and register a deed of sale in favour of Respondent1 on the plea that the same became barred by limitation.

Hence, a suit for specific performance of the said agreement for sale dated 18.4.1971 was filed in the Court of Munsif, Ghatal, District Midnapore, West Bengal which was marked as Title Suit No.133 of 1985. It is not in dispute that not only had the appellant filed a caveat in the said suit, it purchased the suit property on 13.11.1985 i.e., during pendency thereof. Even in the deed of sale executed in favour of the appellant by the Company the factum of the said suit being pending in the Court had specifically been mentioned.

The trial Court negatived the contention of the plaintiff and the plea of limitation was also negatived and the suit was dismissed. The appeal was also dismissed by the first appellate Court. In the second appeal before the High Court since there was no substantial question of law involved as per Section 100(4) of CPC, the second appeal was also dismissed. Hence, the appeal before the Honourable Apex Court, wherein it has been held as follows:-

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"In R.K.Parvatharaj Gupta Vs. K.C.Jayadeva Reddy wherein one of us was a member, it was observed: (SCC p.431, paras 10-11)

10.In terms of the said article, a suit for specific performance of a contract is required to be filed within three years; in the event no date is fixed for the performance, within a period of three years from the date when the plaintiff had notice that performance is refused. The notice dated 24.4.1984, thus, is required to be construed into the context of the agreement dated 13.10.1982 entered into by and between the parties.

11. There cannot be any doubt whatsoever that in respect of a contract for sale of immovable property, time is not of the essence of the contract, but the question as regards the conduct of the appellant must be considered in the backdrop of the events noticed hereinbefore."

The said decision has again been noticed in Gunwantbhai Mulchand Shah Vs. Anton Eli Farel wherein it has been held: (SCC p.639, para 8)

8. We may straightaway say that the manner in which the question of limitation has been dealt with by the courts below is highly unsatisfactory. It was rightly noticed that the suit was governed by Article 54 of the Limitation Act, 1963. Then, the enquiry should have been, first, whether any time was fixed for performance of the agreemnt for sale, and it if was so fixed, to hold that a suit filed beyond three years of the date was barred by limitation unless any case of extension was pleaded and established. But in a case where no time for performance was fixed, the court had to find the date on which the plaintiff had notice that the performance was refused and on finding that date, to see whether the suit was filed within three years thereof. We have explained the position in the recent decision in R.K.Parvatharaj Gupta Vs. K.C.Jayadeva Reddy. In the case on hand, there is no dispute that no date for performance is fixed in the agreement and if so, the suit could be held to be barred by limitation only on a finding that the plaintiffs had notice that the defendants were refusing performance of the agreement. In a case of that nature normally, the question of limitation could be decided only after taking evidence and recording a finding as to the date on which the plaintiff had such notice. We are not unmindful of the fact that a statement appears to have been field on

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behalf of the plaintiffs that they do not want to lead any evidence. The defendants, of course, took the stand that they also did not want to lead any evidence. As we see it, the trial Court should have insisted on the parties leading evidence on this question or the court ought to have postponed the consideration of the issue of limitation along with the other issues arising in the suit, after a trial.

In view of the aforementioned pronouncements of this Court, we are of the opinion that the plea raised by the learned counsel for the appellant that the suit was barred by limitation cannot be accepted as all the court have arrived at a finding of fact that the period for execution of the deed of sale had been extended.

So it was held by the Honourable Apex Court that it cannot be said that the suit was barred by limitation.

But the facts of the above said case will not be applicable to the present facts of the case for the following reasons:-

i) the trial Court even before a full fledged trial has straightaway dealt with the question of limitation, which was considered unsatisfactory by the Apex Court.

ii) The trial Court in that case has failed to note the date on which the plaintiff has noticed that the performance was refused. In the case on hand there was no time fixed in the agreement of sale for the performance of the contract. Basing reliance on 2006(2) SCC 428 = 2006 (2) Scale 156 (R.K.Parvatharaj Gupta Vs. K.c.Jayadeva Reddy), the Honourable Apex Court has observed that in a case of this nature the question of limitation shall be decided only after taking evidence regarding the fact that the plaintiff had such notice. In the case on hand four months time has been stipulated from the date of execution of Ex.A.1 ie. 1.2.1978.

11. On the other hand the learned counsel appearing for the appellant relying on an early decision of this Court in AIR 1919 Madras 317 (Rangasami Chetti Vs. Thangavelu Chetti), contended that an attachment will not cover under the expression "an injunction or order" in Section 15 of the Limitation Act. The exact observation of the court in the said decision runs as follows:-

"The question is whether the suit is in time. The first contention raised by the learned vakil for the appellant before us was that Section 15 of Limitation Act, saved the bar because the attachment was pending between November 1913 and February 1915. This contention must be overruled. There is

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the direct decision of the Allahabad High Court in Shib Singh Vs Sita Ram [1894 (17) Madras 316] to the effect that an attachment is not covered by the expression 'an injunction or order' in Section 15 of Limitation Act. The judicial Committee in Beti Maharani Vs. Collector of Etawa [1895 (17) All. 198] held that in the case of an attachment before judgment Section 15 will not save the bar. In that decision they expressly approve the principle enunciated in shib Singh Vs. Sita Ram. In Shunmugam Vs. Moidin [1885(8) Madras 229] it seems to have been suggested that the prohibitory order issued during the attachment would come within the meaning of Section 15. That dictum cannot be regarded as good law in the face of Beti Maharani Vs. Collector of Etawah. "

12. The learned counsel for the appellant also relied on the decision reported in AIR 1959 SC 198 (Siraj-ul-Haq Khan and others Vs. The Sunni Central Board of Waqf UP and others), where in also the Honourable Apex Court has reiterated the above proposition of law as follows:-

"Section 15 provides for "the exclusion of time during which proceedings are suspended" and it lays down that 'in computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made and the day on which it was withdrawn, shall be excluded". It is plain that, for excluding the time under this section, it must be shown that the institution of the suit in question had been stayed by an injunction or order; in other words, the section requires an order of an injunction which stays the institution of the suit. And so in cases falling under Section 15, the party instituting the suit would by such institution be in contempt of Court."

13.The other two ratios viz., 1978(II) MLJ 412 (R.Krishnamurthy and others Vs. Narayana Pillai and another, and Narayana Pillai Vs. R.Krishnamurthy and others) and AIR 1957 Travancore-Cochin 40 (Kuruvilla Kuruvilla Vs. Ouseph Joseph) relied on by the learned counsel for the appellant have been produced before the trial Court and the same have been dismissed by the trial Court. In 1978(II) MLJ 412 (R.Krishnamurthy and others Vs. Narayana Pillai and another, and Narayana Pillai Vs. R.Krishnamurthy and others) it has been held as follows:-

"The only question is whether section 15 of the Limitation Act, 1963, applied and whether the suit is within time. Section 15(1) runs as follows:-(which was already extracted about)

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In order that this provision could apply, the institution of any suit or execution application should have been stayed by injunction or order. If it had been so stayed the time of the continuance of the injunction or order will be excluded. In the present case the proceedings which are relied on to bring the case within the scope of section 15 of the Limitation Act, is O.S.No.24 of 1952. It was filed on 21st March, 1952. It may be remembered that on 13th March, 1952, E.A.No.514 of 1951, in E.P.No.520 of 1951 was disposed of by the learned District Munsif of Palani. In the application there was a prayer for delivery of the property mentioned int he order of the Rent Controller, Dindigul after the removal of the obstruction offered by the second defendant and his mother. That application was allowed and delivery was ordered on 9th April, 1952. The second defendant in the present suit and his mother, who were the respondents to the said application were, however, referred to a civil suit to establish their title. It was in pursuance thereof they filed O.S.No.24 of 1952. They filed also I.A.No.118 of 1952 and there was an interim stay of E.P.No.520 of 1951 on the same date viz., 21st March, 1952. This interim stay was made absolute on 2nd August, 1952. On 3rd March, 1953, O.S.No.24 of 1952 was disposed of. The claim put forward by the appellants is that the period between 13th March, 1952 and 3rd March, 1953 should be excluded under the provisions of section 15 of the Limitation Act. The prayer in the suit as well as in the application for stay was only in respect of the execution proceedings arising out of the order of the Rent Controller, Dindigul in M.B.A.No.112 of 1960 in which he had ordered the eviction of the defendants from the property. A reference to Ex.A.39 and A.40 being the orders granting the interim stay and the order making it absolute respectively, will show that there was no injunction or order staying any suit."

Following the above said ratios only the learned trial Judge has come to a conclusion that the relevant period stayed in execution proceedings in respect of the suit property in other suit cannot save limitation in this suit, which is filed for specific performance of the contract in respect of the suit property. But to our dismay the learned first appellate court has brushed aside the findings of the trial Court and not even discussed about the facts and the findings in those two ratios. This attitude of the first appellate Court is deprecated as an uncared and lethargic way of applying Judge made law to the present facts of the case. Under such circumstances, I am of the considered view that the findings of the first appellate Court is liable to be set aside for the reasons indicated about. Point is answered accordingly.

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14. In the result, the second appeal is allowed and the decree and judgment in A.S.No.12 of 1993 on the file of the Court of Subordinate Judge, Dharmapuri is set aside and the suit in O.S.No.52/1985 on the file of the Court of District Munsif, Dharmapuri is dismissed. In the circumstances of the case, there is no order as to costs. Connected CMP.No.2215/1997 is closed.

Sd/
Asst.Registrar

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Sub Asst.Registrar

ssv

To

1.The Subordinate Judge, Dharmapuri. (with records if any)
2.The District Munsif, Dharmapuri.
3. The Record Keeper,
V.R.Section, High Court, Madras.

1 cc To Mr.A.Arul Mozhi, Advocate, SR.3503.
1 cc To Mr.D.Sivakumaran, Advocate, SR.3313.

S.A.No.191 of 1997

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